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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1945**

No. 625

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CECIL I. HUST, Petitioner and Plaintiff-Respondent below,

vs.

MOORE-McCORMACK LINES, INC., Respondent and Defendant-Appellant below.

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## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

Petitioner submits the following brief in reply to respondent's brief in opposition to the petition for writ of certiorari.

## EXISTENCE OF SUBSTANTIAL FEDERAL QUESTION

On the basic question of jurisdiction respondent argues only that this case involves solely a question of fact whether petitioner was an employee of respondent and that this Court has already established that the relation of employer-employee is necessary in suits under the Jones Act (46 U.S.C. §688) and that where only one conclusion can be drawn from the evidence the Court should direct a verdict.

We do not pause again to cite cases in which this Court has taken jurisdiction even though they involve purely questions of fact. (Pet. Br. 8.) We submit, how-

ever, that regardless of whether the points referred to by respondent have been established, it cannot be denied that this Court has never decided the question whether under the standard General Agency Agreement of 4-4-42 (Dft. Ex. 21; R. 131, 149 ff; offered R. 116) an employer-employee relationship exists between steamship companies designated as general agents of the War Shipping Administration and the crews of such ships, a question affecting the rights of thousands of seamen. Likewise, we submit that there is no single and inescapable conclusion from the evidence of this case that there is no such employer-employee relationship between this company and the crew of this ship. We, of course, contend that the only conclusion that can properly be drawn is to the contrary. In any event, the conflict of decisions by lower courts on this identical question is alone conclusive that there is no such inescapable conclusion as urged by respondent (Pet. 11-12; Pet. Br. 26), aside from the evidence analyzed in petitioner's brief (pp. 28-40) which we submit is far more than substantial evidence in support of petitioner's position on the issue of the employment relationship. Moreover, the majority of such decisions, as cited in petitioner's brief and as argued therein, together with the decision of this Court in the case of *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, support the proposition that such a conclusion, as reached by the Oregon Supreme Court, is "probably not in accord with applicable decisions of this court."

## EVIDENCE OF EMPLOYER-EMPLOYEE RELATIONSHIP

On this question respondent raises four points as discussed below:

### 1. Whether Company Responsible for Operation of Ship.

Respondent makes the flat statement, undocumented by references to contract provisions or other evidence, that:

> "The physical operation of the ship was not a duty of the Agent, but remained with the War Shipping Administration." (Resp. Brief, p. 4.)

This statement, one of the basic premises on which respondent builds its argument, merely is an assumption which wholly begs the question. That the premise is false is shown not only by the language of the general agency agreement revealing an intent that the Company be responsible for operation of the ship (Dft. Ex. 27, R. 131, 149 ff., offered R. 116, as analyzed in petitioner's brief, pp. 28 to 32), but also by other evidence, including the expressed intent of Congress itself that ships under such agreements were to be "operated by experienced steamship companies." (See Pet. Br., p. 51-2. See also *Moser v. Standard Oil Co.*, 60 F. Supp. 6, not cited in petition or supporting brief.)

### 2. Whether Article 3A(d) Constituted the War Shipping Administration as Employer of the Crew and Acted as Notice to Petitioner to That Effect.

Respondent next sets forth Article 3A(d) of the General Agency Agreement (supra) designating the Master as an agent and employee of the United States

and calls attention to the fact that this provision was also included in the "Statement of Policy" (Dft. Ex. 25, R. 167, offered R. 130) imputing knowledge of its contents to the petitioner. (Resp. Br. 5-6.) Respondent later argues that these provisions "make it about as clear as the English language can, that these War Shipping Administration crews . . . are not employees of the Agents." (Resp. Br. 14-5.)

Again we submit that petitioner begs the question. No attempt is made to analyze the terms of this contract provision in any way comparable to the analysis set forth in petitioner's brief and supporting the contrary conclusion that although the Master may have been agent of the United States for the purpose of seeing that necessary wartime orders and regulations were complied with, the Master was left free to act also as agent for the Company in discharging its duties under the agreement and that the crews "procured" by the steamship company "through its usual channels and in accordance with customary practices" continue as usual to be its own employees. (Pet. Br. pp. 29-30; 33-5.) Far less is it explained how the inclusion in a union agreement of a provision concerning the meaning of which the lower courts are in hopeless conflict can act as unambiguous notice to all union members that they are no longer employees of the company, as in the past, but by virtue of that contract provision alone have become employees of the United States.

### 3. Whether the Shipping Articles Constituted War Shipping Administration as Employer of Crew.

Respondent next argues that since the Shipping Articles were between the crew and the Master, who was an employee of the United States, it follows that the crew

were also employees of the United States. (Resp. Br. 6-7.) That this is a *non sequitor* is at once apparent when it is realized that Shipping Articles have for years been customarily signed between the crew and the Master regardless of whether both are employed by the same employer; that there is no reason why both must be employees of the same employer, and that there is nothing to prevent the owner of a ship from furnishing the Master, while the management and operation of the ship, including the employment of its crew and the assumption of all attendant liabilities, may be assumed by the charterer or owner *pro hac vice*. See *Hill v. Leeds*, 149 F. 878 (owner and charterer given equal authority over Master and vessel); *Gibson v. Manetta Co.*, 194 F. 331, at 334. See also: *The Del Norte*, 111 F. 542, aff'd. 119 F. 118; *Golcar S.S. Co. v. Tweedie Trading Co.*, 146 F. 563; *The Charlotte*, 285 F. 84, at 87.

**4. Whether Revenue Code or Public Law 17 Constitute War Shipping Administration as Employer of Crews.**

Respondent next quotes from the Internal Revenue Code, sec. 1621 (a) (9) referring to "services performed . . . on or in connection with any vessel as an employee of the United States employed through the War Shipping Administration . . ." (Resp. Br. 7.) There is nothing in this provision, however, to show that it was intended to apply to crews of merchant seamen on ships such as the SS "MARK HANNA" under the General Agency Agreements of 4-4-42 or that it was intended to apply other than to Masters and others who may be conceded to be employees of the United States. On the contrary, the withholding tax forms prepared in this case indicated that the company was

the "employer by whom paid" the tax for petitioner. (Pet. Br. 45.)

As for Public Law 17, which respondent quotes as referring to seamen as "employees of the United States" (Resp. Br. 7), we would refer to the analysis of this statute as a whole in petitioner's brief (pp. 50-56). It is worthy of note that respondent, while indicating that this was "merely a clarifying piece of legislation" and that seamen "still retain their rights under the Jones Act," concedes that the Act makes "one modification, viz., that their procedural remedy will be against the United States under the Suits in Admiralty Act." (Resp. Br. 7.) It follows from respondent's own argument that seamen on ships under General Agency Agreements injured prior to enactment of Public Law 17, as in this case, would be recognized by that Act to have had rights under the Jones Act for the period prior to Public Law 17, unlimited by the procedural remedy under the Suits in Admiralty Act. This is made doubly clear by provisions for "election of remedies" in such cases. (See Pet. Br. 56.)

## EVIDENCE OF NEGLIGENCE

Respondent's argument that there is no evidence to support a finding of negligence on its part is based primarily on three premises.

**A. That respondent was neither the operator of the ship nor the employer of the crew. (Rep. Br. 8-9).**

Again, this assertion begs the question, is wholly undocumented and unsupported by references to the evidence other than the provisions of Article 3A(d) of the Agreement and to Shipping Articles (supra). On

the other hand, petitioner has called attention in his brief to at least a showing of substantial evidence to support the jury's finding that respondent was employer of the crew and, as implicit in its finding of liability, that respondent was also operator of the vessel. (Pet. Br. 28-50.)

**B. That the Master had full control and responsibility for the ship, including the failure to provide a light in the locker room and a guard chain around the hatch, as well as the order to petitioner to go into the locker room, and that since the Master was an employee of the United States the respondent cannot be held liable for this accident. (Resp. Br. 9-10.)**

We submit that this argument reveals the basic fallacy of respondent's entire case. We concede that the Master of a ship is customarily responsible for everything that goes on aboard ship while at sea. It does not follow, however, that simply because he is employed by the owner of the ship, the charterer or operating agent of the vessel may not still be liable for accidents resulting from negligence in its operation. This is demonstrated by the cases cited above. Supra, p. 5.)

It is an established principal of agency that although one may be in the general service of another, yet in respect to particular work he may be transferred to the service of a third person. *Standard Oil Co. v. Anderson,* 212 U.S. 215, at 220. It is also apparently established admiralty law that in many situations the Master acts as agent for all parties interested in a vessel or its cargo. Thus the obvious rationale is that there is no reason why the Master cannot be an employee of the government, at least for some purposes,

and still be an agent of the company for the purpose of performing its duties under the agency agreement. This is particularly true where, as here, the Master is furnished by the general agent, as provided under Article 3A(d), and the contract also provides that the agent is to have responsibility for both operation and maintenance of the vessel. (See Pet. Br. 28-32.)

**C. That respondent's duty of maintenance was limited to overall repairs when the vessel is in port. (Resp. Br. 13-4.)**

This argument is also based on the false premise that while at sea the vessel was under control of the Master and that the Master was exclusively an agent of the government. Respondent also refers vaguely to Article 14 of the Agreement as supporting this argument, but that article not only imposes the duty of making general overall repairs while the vessel is in port, but also includes "maintenance" of all "equipment," without qualification as to time or place. This is supported by references to "maintenance" in Articles 3A(c), 4(a) and 7. In a broader sense, however, this question goes back to the question previously discussed of whether the company was the operator of the ship, since responsibility for accident resulting from failure to maintain lights and guard chains must naturally fall upon the operator and all the evidence summarized in petitioner's brief, including provisions for insurance of the company against such operating risks, supports this conclusion. (See Pet. Br. 28-50.) As to the standard of care in such cases, see *Phillips v. Matson Nav. Co.*, 62 F. Supp. 247, not cited in petitioner's brief.

## COMMENTS ON "FURTHER REMARKS" IN RESPONDENT'S BRIEF

### 1. Reliance by Respondent Upon "Immunity" Under Jones Act. (Resp. Br. 10.)

Respondent's denial of reliance upon such an immunity under the Jones Act (Rep. Br. 10) is sufficiently answered by the cases cited on the top of page 10 of the petition.

### 2. Application of Brady Case. (Resp. Br. 10.)

Respondent would dismiss the case of *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, as "in no respect . . . like the present case." Petitioner's brief frankly recognized certain differences between the facts of the two cases (Pet. Br. 24-5.) We submit, however, that on the basic question of the liability in this case, as affected by the terms of the agency agreement and of Public Law 17, upon which respondent relies, the following principles recognized in the *Brady* case are equally applicable here:

> "The withdrawal of the right to sue the agent for his torts would result at times in a substantial dilution of the rights of claimants . . . We can only conclude that if Congress had intended to make such an inroad on the rights of claimants it would have said so in unambiguous terms." (Id. at 581.)
>
> * * *
>
> "Moreover, if petitioner had a cause of action against respondent, it is difficult to see how she would be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained." (Id. at 583.)

### 3. Application of NLRB and NWLB Decisions. (Resp. Br. 11.)

Respondent would also dismiss decisions of the National Labor Relations Board and National War Labor Board holding that seamen are employees of steamship companies under similar contracts on the ground that under the recent decision of this Court in the case of *N.L.R.B. v. Hearst,* 322 U.S. 111, the term "employee" has a peculiar meaning in such proceedings not applicable under the Jones Act, which, according to petitioner, adopts the "conventional relationship as understood at common law," citing *Robinson v. B. & O. R. R. Co.,* 237 U.S. 84, and *Hull v. Philadelphia Reading R. Co.,* 252 U.S. 475. (Resp. Br. 11 and 12.) It is true that this Court over 25 years ago in the *Robinson* and *Hull* cases held to the "conventional relationship" in cases under the Employers Liability Act and refused to follow the dissent by Associate Justice Clarke in the *Hull* case that "we are not dealing here with mere words or with merely 'conventional relations,' but with very serious realities." In the *Hearst* case, however, this Court gave full recognition to the realities of the results that would follow from continuing to adopt such a "conventional" perspective in the application of social legislation, recognizing that "the context of a statute must be read in the light of the mischief to be corrected and the end to be attained." (Id., at 124.) This more realistic approach of the Court has not been limited to cases under the National Labor Relations Act.

We thus submit that since this case is apparently conceded by respondent to involve primarily a question of fact (Resp. Br. 2) and was submitted to the jury under wholly "conventional" instructions de-

scribing the employer-employee relationship (R. 135-6) there is no reason to sustain the reversal of its verdict by an appellate court by substituting its own "conventional" ideas on the subject, with which these instructions were wholly in accord, particularly in view of the realities of the situation, including the fact that seamen on ships operated by general agents of the Maritime Commission and War Shipping Administration had for years been regarded as employees of the steamship companies, the fact that this relationship would be changed only by accepting respondent's construction of contract provisions between the companies and the government, and the fact that any other result would mean that such seamen would have no remedy for injuries occuring prior to Public Law 17, and even after passage of that Act only upon surrender of their rights to trial by jury and in a court of their own state.

**4. Application of Collective Bargaining Agreements Between Respondent and the Unions. (Resp. Br. 11-12.)**

Respondent states that the collective bargaining agreements with the unions were made when the company "actually was an employer," and that the War Shipping Administration "modified them, insofar as employment was concerned," by the Statement of Policy which referred to Section 3A(d) of the agency agreement.

Since the Statement of Policy expressly continues in effect each and every provision of the union contracts between the unions and the companies which were still to at least "procure" the crews, it would follow that this would include a continuance of the employer-employee relationship unless it can be said that Article

3A(d) so clearly provided to the contrary that by accepting the Statement of Policy embodying that article the unions expressly agreed to an abandonment of this relationship with the companies. As we have seen, however, no agreement by the unions to abandon this basis of the long established rights of their members under the Jones Act can be found in this masterpiece of legal equivocation. (Pet. Br. 33-5; 41-3.)

**5. Other Evidence of Liability. (Resp. Br. 12.)**

Respondent deems the "various other items of so-called 'evidence' . . . referred to on pages 44 to 48 of petitioner's brief . . . too slight to notice . . ." We leave that question to the consideration of this Court with the sole comment that the jury found sufficient evidence as a basis for its verdict, with the result that, there being no claim of prejudicial error, that verdict must stand unless it can be said that there was absolutely no substantial evidence to support the verdict.

**6. Respondents Duty to Maintain the Vessel. (Resp. Br. 13.)**

This point has already been disposed of. (Supra, p. 8.)

**7. Respondent as Owner "Pro Hac Vice." (Resp. Br. 14.)**

Respondent charges petitioner with a lack of comprehension of the meaning of this term and states that in order to be an owner "pro hac vice" the owner must relinquish all control and the charterer must be solely responsible for manning, equipping and supplying the vessel and must exercise complete physical control over her.

We need only refer to cases cited in petitioner's brief, page 59, to show that there is no such hard and fast rule, but that many qualifications have been recognized, so long as the management and possession of the vessel is turned over to the shipping company, as clear from the provisions of the agency agreement in this case. (Pet. Br. 28 to 32. See also cases cited, supra, p. 5.)

As to the respondent's question of how the War Shipping Administration and the Agent could both be owners "pro hac vice" in view of the fact that the title of the general agency agreement refers to "vessels of which the W.S.A." is owner or owner "pro hac vice," it seems sufficient to point out:

a. That although the W.S.A. might have been the owner "pro hac vice" of some other and older ships, it has never been contended that it was other than the general owner of the newly built "Liberty" ship S.S. "MARK HANNA" and that fact has apparently been conceded. (See Ptfs. Ex. 13, R. 142; Dfts. Ex. 21, R. 149.)

b. That whether the W.S.A. was an owner "pro hac vice" is not to be determined by a mere "label" included in the title of an agreement, but by reference to its substantive provisions and to other material evidence, which, as shown in petitioner's brief (pages 28-32) leads to a contrary conclusion in this case.

## CONCLUSION

Respondent concludes by making the broad claim that all of the evidence in support of petitioner's claim and carefully documented in petitioner's brief, including references to and analysis of provisions of the general agency Agreement, is "not even a scintilla when properly understood" and that the case is one based merely upon inferences inconsistent with undisputed facts. (Resp. Br. 14-5.) We assume that the respondent must regard as these "undisputed facts" its bare claims, for the most part wholly undocumented and unsupported by reference to actual evidence, such as that the company had nothing to do with the operation of the ship.

We rest confident that the facts of this case will be fully and "properly understood" by this Honorable Court with the same realistic view of the facts of economic life as exhibited in most of its recent decisions arising under other social legislation and that the Court will not be misled by the attempt of this corporation to escape reality, and liability, by the legalistic device of assuming that the ambiguous terminology of one provision of a contract between it and a government agency can sweep away all of its long existing responsibilities to the crews of its ships.

Respectfully submitted,

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